ABDUL MANAF MOHD GHOWS & ORS

v.

NUSANTARA TIMUR SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-191-94]
8 JULY 1997

COMPANY LAW: *Shares - Sale of shares - Whether directors of first respondent liable for balance of purchase price*

CONTRACT: *Breach - Sale and purchase of shareholding of company - Whether vendors entitled to specific performance and damages for breach of agreement*

CONTRACT: *Breach - Oral agreement - Whether directors of first respondent liable for undertaking to assume liability of first respondent - Whether liable for damages*

The vendors had entered into a sale and purchase agreement with the 1st respondent for the entire shareholding of a company called Seri Naga Construction Sdn Bhd. A deposit was paid, and the agreement was to be completed by the respondents upon obtaining a loan to settle the balance of the purchase price. The respondents were unable to obtain the loan and as the agreement could not be completed, the vendors sued for the balance of the purchase price plus interest and damages. The trial judge allowed judgment to be entered against the respondents for the balance of the purchase price with interest but dismissed the claim for damages. The vendors appealed against the dismissal. It was alleged that the 2nd and 3rd respondents had given an understanding to assume liability for the balance of the purchase price, and to redeem the property that was charged to the financial institution, so as to discharge the 12–14 appellants of their liabilities under the guarantees. Thus, the issues that arose were: (i) whether the vendors' claim for damages for the breach of the agreement was correctly made; (ii) whether in the alternative the 2nd and 3rd respondents were liable to pay the balance of the purchase price; and (iii) whether the trial judge was correct in dismissing damages for breach in the undertaking, by the 2nd and 3rd respondents, to assume liability for the balance of the purchase price.

Held:
Per Siti Norma Yaakob JCA

[1] The vendors were adequately compensated by the judgment of the trial judge in awanding them the payment of the balance of the purchase price together with interest. The additional claim for damages against the first respondent must therefore fail.

[2] The 2nd and 3rd respondents were not the contracting parties to the agreement for the purchase of the shares. They could not be personally liable for the balance of the purchase price although they executed the agreement as directors of the 1st respondent.

[3] There was no evidence that the 2nd and 3rd respondents had held themselves out as personally liable for the balance of the purchase price nor was there conclusive evidence that they were to assume the 1st respondent's liability under the agreement.

[4] The 11th–14th appellants could not attribute their losses to the respondents for the arrangements, that were agreed upon in the settlement of the balance of the purchase price, which was hinged upon the settlement of their loan. When the loan could not be settled the respondents were not at fault and they could not be made to answer for any losses incurred.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG SYARIKAT: *Saham-saham - Penjualan saham-saham - Samada pengarah-pengarah responden pertama bertanggungan bagi baki harga belian*

KONTRAK: *Kemungkiran - Penjualan dan pembelian pemegangan saham syarikat - Samada penjual berhak kepada perlaksanaan spesifik dan gantirugi untuk kemungkiran perjanjian*

KONTRAK: *Kemungkiran - Perjanjian lisan - Samada pengarah-pengarah responden pertama bertanggungan bagi akujanji untuk mengambil tanggungan responden pertama - Samada bertanggungan bagi gantirugi*

Penjual-penjual telah memasuki satu perjanjian jualbeli dengan responden pertama bagi keseluruhan pemegangan saham mereka dalam sebuah syarikat yang dipanggil Seri Naga Construction Sdn Bhd. Deposit telah dibayar dan perjanjian tersebut seharusnya disiapkan oleh responden dengan mendapatkan pinjaman untuk menjelaskan baki harga belian. Responden tersebut telah tidak berjaya mendapatkan pinjaman dan oleh kerana perjanjian itu tidak dapat

disempurnakan penjual telah mendakwa bagi mendapatkan baki harga belian ditambah faedah dan gantirugi. Hakim perbicaraan telah membenarkan penghakiman dimasukkan terhadap responden bagi mendapatkan baki harga belian dan faedah tetapi telah menolak tuntutan bagi gantirugi. Penjual-penjual tersebut telah merayu terhadap penolakan itu. Telah dikatakan bahawa responden-responden kedua dan ketiga telah memberikan satu persetujuan untuk bertanggungan bagi baki harga belian tersebut dan untuk menebus hartanah itu yang telah digadaikan kepada institusi kewangan bagi melepaskan perayu-perayu ke-12 hingga ke-14 akan tanggungan mereka di bawah gerenti-gerenti itu. Dengan itu, isu yang dibangkitkan adalah (1) Samada tuntutan penjual bagi mendapatkan gantirugi bagi kemungkiran perjanjian tersebut telah dibuat dengan betul (2) Samada secara alternatifnya responden-responden ke-2 dan ke-3 adalah bertanggungan untuk membayar baki harga belian itu dan (3) Samada hakim perbicaraan betul dalam menolak gantirugi untuk kemungkiran dalam akujanji oleh responden-responden ke-2 dan ke-3 untuk mengambil tanggungan bagi baki harga belian.

Diputuskan:
Oleh Siti Norma Yaakob HMR:

[1] Penjual-penjual tersebut telah diberikan pampasan secukupnya dengan pembayaran baki harga belian berserta dengan faedah. Tuntutan tambahan untuk gantirugi terhadap responden pertama seharusnya gagal.

[2] Responden-responden ke-2 dan ke-3 bukannya merupakan pihak-pihak yang mengikat kontrak kepada perjanjian tersebut untuk pembelian saham-saham tersebut. Mereka tidak boleh bertanggungan secara peribadi bagi baki harga belian walaupun mereka menyempurnakan perjanjian itu sebagai pengarah-pengarah responden pertama.

[3] Tidak terdapat keterangan bahawa responden ke-2 dan ke-3 telah mengemukakan diri mereka sebagai bertanggungan secara peribadi bagi baki harga belian dan tidak juga terdapat keterangan yang muktamad bahawa mereka seharusnya mengambil tanggungan responden pertama di bawah perjanjian itu.

[4] Perayu-perayu ke-11 hingga ke-14 tidak boleh mengaitkan kerugian mereka dengan responden-responden hasil daripada persetujuan yang telah disetujui dalam penyelesaian baki harga belian yang mana dihubungkan dengan penyelesaian pinjaman mereka. Apabila pinjaman itu tidak dapat dijelaskan responden-responden tidak bersalah dan mereka tidak boleh diminta memberi jawapan bagi kerugian yang dialami.

[Rayuan ditolak dengan kos.]

Legislation referred to:
Companies Act 1965, s. 67

[Appeal from High Court Malaya, Kuala Lumpur; Civil Case No: S6-22-112-90]

For the appellants - S Periasamy (Charanjit Singh Saini with him); M/s Radzi Sheikh Ahmad, Peri & Saini
For the respondents - Wong Kim Fatt; M/s Gulam & Wong

JUDGMENT

Siti Norma Yaakob JCA:

To appreciate the nature of this appeal, we need to go into some details as to the transactions undertaken by the many parties to this suit as a clear understanding of them would undo some of the confusion created by the mere reading of the appeal records themselves.

The 1st–10th appellants (plaintiffs in the Court below) were the shareholders of a private limited company known as Seri Naga Construction Sdn. Bhd. (Seri Naga), a property development company, incorporated under the Companies Act, 1965 with an authorised capital of RM1 million divided into one million ordinary shares at RM1 each. Between them, the 1st–10th appellants were the registered and beneficial owners of 700,001 shares of RM1 each in Seri Naga which also represent the paid up capital of the company. Between these ten shareholders, the 10th appellant was the majority shareholder holding more than 50% of Seri Naga's equity. Additionally the 1st and 2nd appellants were also the Directors of Seri Naga and that Seri Naga's known asset at the material time was a piece of land known as Lot 10, Grant No. 19811, Town of Ayer Hitam, District of Batu Pahat, State of Johor (the property).

On 3 November 1986, the 1st–10th appellants (the vendors), entered into a sale and purchase agreement (the agreement), with the 1st respondent company (Nusantara Timur, a defendant in the court below) for the sale of their entire shareholdings of 700,001 shares in Seri Naga to Nusantara Timur for a consideration of RM1 million. This was in effect a takeover of Seri Naga by Nusantara Timur.

The 2nd respondent and his son, the 3rd respondent (both defendants in the court below) were the Directors of Nusantara Timur which had a paid up capital of RM250,000 and the sole shareholder of Nusantara Timur was Low Nam Hui & Sons Sdn. Bhd. (the family company) owned and controlled by the 2nd respondent.

It is not disputed that under the agreement, Nusantara Timur made a deposit of RM150,000, towards the purchase price with the balance of RM850,000 to be made within 60 days after the date of the agreement ie, on or before 3 December 1986.

Under preamble (ix) of the agreement, the purchase would be completed with Nusantara Timur obtaining a loan to settle the balance of the purchase price. That same undertaking is reconfirmed by cl. 2.2.2 of the agreement. Despite attempts made by the 2nd and 3rd respondents to settle the balance, the details of which appear subsequently in this judgment, Nusantara Timur defaulted in their obligation and for this breach they are sued by the vendors for the following reliefs:

(1) Judgment for RM850,000, this being the balance of the purchase price due under the agreement.

(2) Interest thereon from 4 January 1987, the date of default to date of judgment.

(3) Interest on the judgment sum at 8% per annum from the date of judgment to the date of realisation.

(4) Damages.

That takes care of the vendors' cause of action insofar as Nusantara Timur is concerned and that is clearly averred to in paras. 20 and 21 of the statement of claim. In the Court below, the vendors succeeded with part of their claim and the learned trial Judge entered judgment against Nusantara Timur in terms of (1)–(3) *supra*, fixed the pre-judgment interest at 5% per annum and costs. There is no appeal against this part of the trial Judge's decision.

The trial Judge however dismissed the vendors' prayer for damages against Nusantara Timur and likewise the alternative claims by the vendors and the remaining appellants against the 2nd and 3rd respondents for the recovery of the balance of the purchase price of the shares as well as damages for breach of undertakings allegedly given by them. It is to appeal against the orders of dismissal that we were concerned with in this appeal.

We must confess that we found great difficulty in appreciating the claims against the 2nd and 3rd respondents from a perusal of the statement of claim itself as they have not been clearly pleaded.

To begin with such claims are pleaded in the alternative and the basis of such claims are set out in paras. 22–24 and 27 of the statement of claim. Paragraphs 25, 27 and 30 then set out the particulars identifying the cause of action against the 2nd and 3rd respondents.

The undisputed particulars show that the 11th appellant (also a plaintiff in the court below) had obtained a term loan of RM850,000 (the Madon loan) from a finance company, Kewangan Usaha Bersatu Berhad (KUBB). Security over the Madon loan was provided by:

(1) a third party legal charge over the property, being Presentation No. 17021/80, Jilid 1497, Folio 15,

(2) the personal guarantees of the 12th and 13th appellants (plaintiffs in the Court below) who were the Directors and shareholders of the 11th appellant at the material time and

(3) the corporate guarantee of the 14th appellant (also a plaintiff in the Court below).

Apart from these particulars it is not too clear from the appeal records when this Madon loan was approved or the purpose why the liability was incurred. However from preamble (vi) of the agreement, it is clear that the Madon loan was already in existence when the agreement was executed on 3 November 1986.

With the Madon loan in place, and despite the fact that Nusantara Timur was still indebted to the vendors for the balance of the purchase price of the shares, the entire shareholdings of Seri Naga were nevertheless transferred within ten days of the execution of the agreement and subsequently registered in the name of Nusantara Timur. The 2nd and 3rd respondents replaced the 1st and 2nd appellants as the new Directors of Seri Naga and the new Directors took over the management and control of that company.

These events were allowed to happen following the trust and the good relationship enjoyed by the vendors with the 2nd and 3rd respondents. This was so as apart from the takeover of Seri Naga by the 2nd and 3rd respondents through Nusantara Timur, there was also the takeover of another company known as Maza Development Sdn. Bhd. by the 2nd and 3rd respondents. The consideration for Maza Development had been settled in full and based on this and undertakings allegedly given by the 2nd and 3rd respondents, the vendors readily transferred the control and management of Seri Naga to the 2nd and 3rd respondents without waiting for the sale of the shares to be completed. The alleged undertakings were that the 2nd and 3rd respondents would assume liability for the balance of the purchase price by paying the amount directly due to KUBB, redeem the property and discharge the 12th–14th appellants of their liabilities under the guarantees they had given to KUBB for the Madon loan. The 2nd and 3rd respondents would assume such liabilities personally.

Before us, Mr. S. Periasamy learned Counsel for the appellants was heard to explain that the 2nd and 3rd respondents had agreed both orally and in writing to settle the Madon loan directly with KUBB, the principal sum of which was also the same as the balance of the purchase price for the shares, and to treat such payment as completing the purchase of the shares.

It would appear that there was some sort of a contra arrangement by which settlement of the Madon loan by the 2nd and 3rd respondents would also settle the outstanding amount due under the agreement. From this we can only conclude that the vendors may well have intended to utilise part of the proceeds of sale of the Seri Naga shares to settle the Madon loan.

In any event pursuant to these rather unusual arrangements, Seri Naga (and not Nusantara Timur) applied for and was approved a term loan of RM850,000 (the second loan) by KUBB. KUBB's letter of approval dated 19 March 1987 cites the purpose of the second loan to be applied to off-set the Madon loan. For this second loan, the securities were to be provided by:

(1) a first party first fixed charge over the property. This must of necessity mean that the Seri Naga had to redeem the property first before it could be utilised as a security for the second loan.

(2) the personal guarantees of the 2nd and 3rd respondents. There was this allegation that the new guarantees would substitute the ones executed by the 12th and 13th appellants for the Madon loan and

(3) the corporate guarantee of Far East Plywood Berhad which the appellants say would substitute the one executed by the 14th appellant in favour of KUBB.

It is not disputed that KUBB never disbursed the second loan to Seri Naga and the reasons given are that

(1) the 2nd and 3rd respondents had failed to execute the relevant documents and pay the necessary stamp duty and other charges and

(2) in any event, the facility was insufficient to pay off the Madon loan and the accrued interest.

Quite apart from the above reasons, we consider the second loan to be a transaction caught by s. 67 of the Companies Act 1965 as Seri Naga was indirectly providing financial assistance in the purchase of its own shares. KUBB must have entertained its own reservations on the legality of the second loan as expressed by condition 20 in its letter of approval dated 19 March 1987.

Thus up to the time when the appellants filed their civil suit against the respondents the following were not disputed.

(1) The balance of the purchase price of the shares had not been paid.

(2) The second loan never materialised and with it the assumptions of the liability by the respondents for the Madon loan.

(3) The Madon loan still remained due and owing. The only off-setting occured when KUBB foreclosed the property but the proceeds from the auction of the property were not sufficient to settle the Madon loan in full.

(4) By agreement dated 31 October 1988, Nusantara Timur sold all its shares in Seri Naga to Sutra Development Sdn. Bhd. for a nominal sum of RM10.

In addition to praying for specific performance of the agreement and damages for its breach, the appellants have also pleaded in the alternative a reversion of their *status quo* as regards the Seri Naga shares ie, that the respondents effect a transfer of them to the vendors, that the 2nd and 3rd respondents resign as Directors of Seri Naga and deliver all documents, books and papers belonging to Seri Naga to the vendors.

Perhaps realising the hopelessness of their claim to maintain their *status quo*, the appellants had confined their alternative claims as involving the following two issues in the Court below.

(1) Whether Nusantara Timur is liable to pay the balance of the purchase price plus interests and costs and damages for breach of the agreement to the vendors.

(2) Alternatively whether the 2nd and 3rd respondents are liable to pay the balance of the purchase price of the shares and damages for breach of their undertakings to assume the liability for the Madon loan and in so doing to treat such payment as payment for the balance of the purchase price of the shares as well.

Before us arguments were centred upon the following issues.

(1) Whether the trial Judge's dismissal of the vendors' claim for damages for breach of the agreement against Nusantara Timur had been correctly made.

(2) Whether the trial Judge's dismissal of the alternative prayers by all the appellants against the 2nd and 3rd respondents

(a) for the balance of the purchase price of the shares and

(b) for damages for breach of the undertakings to assume liability for the balance of the purchase price had been correctly made.

Taking the first issue, Nusantara Timur's primary obligation as the purchaser of the Seri Naga shares was to complete the sale by the payment of the purchase price under cl. 2 of the agreement within the completion date. They had complied with the payment of the deposit of RM150,000 under cl. 2.2.1 but not with the balance of the purchase price of RM850,000 within the completion date as specified by cl. 2.2.2. Since time was the essence of the agreement (cl. 11.1), clearly Nusantara Timur had breached the agreement. Under cl. 8.1, the vendors were entitled to treat the agreement as being null and void and to forfeit the deposit. But the vendors did not elect to do so and neither did they forfeit the deposit. Instead following the breach, they continued to treat the agreement as still subsisting and binding and this can be seen from the prayer for specific performance pleaded in the statement of claim. They never abandoned their claim to recover the balance of the purchase price, for which they had succeeded in the court below.

Under such circumstances what other possible damages could the vendors have suffered other than being deprived of the use of the balance of the purchase price? That has since been compensated with the payment of interest both for the pre and post judgment periods. In this respect we see no reason to disturb the finding of the trial Judge that the vendors have already been adequately compensated by the payment of the RM850,000, interests and costs and that the additional claim for damages against Nusantara Timur must fail.

There are two limbs of liability which all the 14 appellants have attached to the 2nd and 3rd respondents. The first is the recovery of the balance of the purchase price under the agreement.

The fact that the agreement was executed by the 2nd and 3rd respondents as Directors of Nusantara Timur does not make the 2nd and 3rd respondents personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely Nusantara Timur's, the contracting party. We can do no better than to quote the trial Judge's reasoning on this.

> A company incorporated under the Companies Act has its own separate legal entity, distinct from its members and officers. It can sue and be sued in its own name and, being an artificial person, it can only act through its directors and officers. It enters into an agreement through its directors and authorised officers. A director or an authorised officer of a company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless

there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

There is also a finding by the trial Judge that there is no evidence both oral and documentary to establish that the 2nd and 3rd respondents had held themselves out to be personally liable for the balance of the purchase price. There is no reason why we should not accept this finding and in any event Mr. Periasamy, learned Counsel for the appellants did not make any submission on this point.

The subsequent arrangements or undertakings relied upon by the appellants against the 2nd and 3rd respondents are founded in a letter dated 22 December 1986, written by 3rd respondent as the Deputy Managing Director of the family company. The letter is addressed to KUBB's solicitors, M/s Ghazali Ariff & Partners wherein there is a statement to the effect that out of the loan of RM5.1 million granted by KUBB presumably to the family company, or a related family company, part of it representing the balance of the purchase price would be utilised to complete the sale of the shares. This of course did not happen.

If indeed that was the intention expressed in the letter, the obligation to settle the sale if any lies with the borrower be it the family company or a related family company, a separate legal entity as opposed to its Directors, the 2nd and 3rd respondents. This is so as the loan of RM5.1 million was not granted by KUBB to the 2nd and 3rd respondents personally.

As for reliance of the undertakings given by the 2nd and 3rd respondents to assume liability for the Madon loan and in so doing was also effectively undertaking to settle the balance of the purchase price, those undertakings if any, are only of academic value as the second loan, upon which the undertakings were made never materialised and in any event the granting of the second loan was subject to a number of conditions precedent which were never fulfilled. There is also an admission by the 12th appellant who testified on behalf of all the other appellants that no reliance can be placed on the two letters dated 22 December 1986 written by the family company to KUBB's solicitors and KUBB's letter dated 19 March 1987 approving the second loan to Seri Naga, to establish that both the 2nd and 3rd respondents had undertaken to be personally liable for Nusantara Timur's debt of RM850,000.

As for their claim for damages against the 2nd and 3rd respondents, they rely on the breach of the undertakings given by the 2nd and 3rd respondents that they would contra the payment of the balance of the purchase price of the shares by assuming liability for the Madon loan. When the second loan granted

by KUBB to Seri Naga to off-set the Madon loan was not disbursed, the appellants complained that as a result they suffered loss and damage when KUBB auctioned the property and the proceeds were insufficient to settle the Madon loan.

The trial Judge found no conclusive evidence of any undertakings oral or documentary given by the 2nd and 3rd respondents to assume the 1st respondent's liability under the agreement. We entirely agree on this conclusion after carefully perusing the evidence and documentary exhibits.

If anybody who should complain about any loss or damage, it would have to be only the 11th–14th appellants in their capacities as the principal debtor and guarantors of the Madon loan. In this instance KUBB's action in foreclosing and auctioning the property was nothing more than the exercise of a chargee's right to a security following a breach. The fact that losses were suffered by the 11th–14th appellants cannot be attributed to the respondents as whatever arrangements that were agreed upon in settlement of the balance of the purchase price hinged upon the settlement of the Madon loan and since the Madon loan had not been settled through no fault of either the 2nd or the 3rd respondents, they could not be made to answer for any losses if any incurred by the 11th–14th appellants.

In this respect the trial Judge made the right decision when he ruled that damages had not been proven against the 2nd and 3rd respondents and there was no need to lift the corporate veil because of the transparency of the many transactions entered into by the parties.

For the reasons given in this judgment the appeal was dismissed with costs and the deposit was ordered to be paid out to the respondents to account of their taxed costs.

Reported by Anne Soh